STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 11, 2013
v	No. 311319 Kent Circuit Court
MIGUEL ANGEL VIDANA, Defendant-Appellant.	LC No. 11-009155-FC

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b.[1] The trial court sentenced defendant as a second-offense offender, MCL 769.10, to a prison term of 23 to 45 years. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his *Batson*[2] challenges to the prosecutor's use of peremptory challenges on juror no. 37, an African-American female, and juror no. 34, an African-American male. Our review is governed by which step of *Batson*'s three steps is before us:

> If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error. [*People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).]

[1] The jury acquitted defendant of a second count of CSC I.

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

The second and third steps are before us.[3]

In the second *Batson* step, the prosecutor must articulate a race-neutral explanation for the use of the peremptory challenge. *Knight*, 473 Mich at 337. A race-neutral explanation is one that is based on something other than the juror's race. *Id.* The prosecutor explained that he excused juror no. 37 because her father was in prison for conspiracy to commit murder and he did not want to take the chance that her father's situation would affect her ability to sit as a fair and impartial juror. The prosecutor explained that he excused juror no. 34 because he was a social worker for Bethany Christian Services. The prosecutor further explained that he regularly excuses social workers because they tend to be more liberal and that the prosecutor's office often represents Bethany Christian Services. Because the prosecutor's explanations for excusing the two jurors were based on something other than their race, the explanations were race neutral. *Id.*

In the third *Batson* step, the trial court must determine whether the prosecutor's race-neutral explanation is a pretext and whether the opponent has proved purposeful discrimination. *Id.* at 337-338. The trial court accepted the prosecutor's race-neutral explanations. The United States Supreme Court has stated:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, this finding "largely will turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." [*Hernandez v New York*, 500 US 352, 365; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (internal citations omitted).]

Defendant has offered no reason to conclude that the trial court clearly erred in believing the prosecutor's race-neutral explanations. Accordingly, we affirm the trial court's rejection of defendant's *Batson* challenges.

Next, defendant argues that the trial court erred when it prevented him from recalling Jessica Lewis to the witness stand. The trial court never expressly denied defendant's request to recall Lewis. But, by telling the trial court that he was not prepared to present his case, defendant essentially requested an adjournment. The trial court denied the adjournment, which prevented defendant from recalling Lewis. We review a trial court's decision whether to grant an adjournment for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). A trial court abuses its discretion when its decision falls outside the range of

[3] The first step, whether defendant presented a prima face case of discrimination, is moot because the trial court ruled on the ultimate issue of purposeful discrimination. See *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A request for an adjournment must be based on good cause. MCR 2.503(B)(1); *Jackson*, 467 Mich at 276. Factors for a trial court to consider are "whether [the] defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Here, defendant did not assert a constitutional right before the trial court. He had already cross-examined Lewis, and his cross-examination had not been limited by the trial court. In addition, defendant's desire to recall Lewis was not based on any testimony given after Lewis testified. Rather, the additional questions that defendant wanted to ask Lewis had escaped him during the "heat of the trial." Further, defendant did not identify for the trial court what testimony he believed his additional questions to Lewis would elicit. Under these circumstances, the trial court's decision to deny defendant an adjournment fell with the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217. Defendant is not entitled to a new trial.

In addition, defendant argues that defense counsel was ineffective to the extent that counsel failed to make a proper objection, offer of proof, or motion for adjournment or failed to ask appropriate questions when Lewis was on the witness stand. Because no *Ginther*[4] hearing has been held, our review of defendant's ineffective assistance claim is limited to errors apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). The record is silent regarding any additional testimony that defendant could have elicited from Lewis. Accordingly, defendant has not established that, even if counsel's performance was deficient, there is a reasonable probability that the result of his trial would have been different. Defendant was not denied the effective assistance of counsel.

Defendant also argues that the trial court erred in admitting evidence of the two knives that were found in the kitchen of the apartment where the offense occurred. According to defendant, the evidence was irrelevant and unfairly prejudicial. We review a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence is generally admissible. MRE 402; *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

CG, the victim of the criminal sexual conduct, testified that defendant, after he brought her to the kitchen from the bedroom, grabbed a knife. Jesse Perdue, who had been sleeping in a bedroom, testified that both defendant and his brother, David Vidana, possessed knives. However, neither CG nor Perdue recognized either of the two knives that were seized from the kitchen. Nonetheless, evidence that two knives were found in the kitchen—and in plain view, in the sink strainer and on top of the knife block—had a tendency to make it more probable that defendant and David possessed knives than it would be without the evidence. MRE 401. In addition, evidence of the two knives would not be subject to undue or preemptive weight by the jury, *Blackston*, 481 Mich at 462, and especially so where the officer in charge of executing the search warrant acknowledged that it is not unusual to find knives in a kitchen. There is nothing in the record to suggest that the jury would be unable to give proper weight to the evidence of the knives. The trial court did not abuse its discretion when it admitted evidence of the two knives. *Unger*, 278 Mich App at 216.

Defendant next argues that David's statement to CG that she should do whatever defendant told her to do, which was relayed by CG to Sara Koster, the nurse who examined CG at the YWCA, was hearsay. Koster testified at trial about the statement. We review a trial court's evidentiary decisions for an abuse of discretion. *Id.*

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. MRE 801; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). The term "statement," as used in the definition of hearsay, means an assertion. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204; 579 NW2d 82 (1998), mod in part on other grounds 458 Mich 862 (1998). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. The trial court admitted CG's out-of-court statements to Koster under the hearsay exception found in MRE 803(4). Defendant does not claim that CG's statements to Koster were not made for the purpose of medical treatment or diagnosis in connection with treatment. Rather, he claims that his statement to CG, which she relayed to Koster, was hearsay.

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." MRE 805. See also *People v Mesik (On Reconsideration)*, 285 Mich App 535, 538; 775 NW2d 857 (2009) ("Where multiple levels of hearsay are involved, all declarations made must not be hearsay or must fall within a recognized exception."). Thus, if David's out-of-court statement to CG was hearsay, it was not admissible as part of CG's statements to Koster unless it also was covered by a hearsay exception. David's statement was not hearsay because it was a command. A command, which is incapable of being true or false, is not an assertion and, therefore, a command cannot be hearsay. *Jones (On Rehearing After Remand)*, 228 Mich App at 205.

Accordingly, the trial court did not abuse its discretion in admitting CG's out-of-court statements, in their entirety, to Koster. *Unger*, 278 Mich App at 216.[5]

Defendant next argues that he is entitled to a new trial because the trial court refused to instruct the jury that "force and coercion" was an element of the CSC I charges. We review de novo claims of instructional error. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Because defendant was acquitted of the second count of CSC I, we limit our review to the trial court's instructions on the first count of CSC I.

Three alternate theories were applicable to the first count of CSC I: (1) defendant was aided and abetted by another person and he used force or coercion to accomplish the sexual penetration, MCL 750.520b(1)(d)(*i*); (2) defendant caused personal injury to CG and used force or coercion to accomplish the sexual penetration, MCL 750.520b(1)(f); or (3) defendant was armed with a weapon, MCL 750.520b(1)(e). The standard criminal jury instructions on the first two alternate theories list force and coercion as a separate element of CSC I. See CJI2d 20.7, 20.9. The trial court's instructions did not expressly state that force and coercion was a separate element. However, the instructions given by the trial court were not erroneous simply because they did not mirror the standard criminal jury instructions. See *People v Williams*, 288 Mich App 67, 76 n 6; 792 NW2d 384 (2010) ("We recognize that use of the standard criminal jury instructions is not mandatory and they are not binding authority.").

A trial court must instruct the jury on the applicable law. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). Jury instructions must include all the elements of the charged offenses. *Id.* When read in its entirety, the trial court's instructions on the first count of CSC I clearly informed the jury that it could not convict defendant on either of the two first theories unless it found that defendant used force or coercion. We note that, after the trial court instructed the jury on the first count of CSC I, it provided a clear and concise summary of the three alternate theories: (1) "the defendant was assisted by another person and he used force or coercion"; (2) "the defendant caused personal injury and, again, used force or coercion"; or (3) "he was armed with a weapon." The instructions included all the elements of the offenses. *Id.* Accordingly, there was no instructional error.

Finally, defendant argues that the trial court erred in scoring offense variables (OVs) 3, 10, 11, 14, and 19. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We will uphold a scoring decision for which there is any evidence in support. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

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[5] Defendant's reliance on *People v Spangler*, 285 Mich App 136; 774 NW2d 702 (2009), is misplaced because he did not make his out-of-court statement to a nurse examiner. The issue in *Spangler* was whether the complainant's statements to a sexual assault nurse examiner were testimonial hearsay and, thus, barred by the Confrontation Clause. *Id.* at 136. *Spangler* would provide the framework for analyzing an argument that defendant does not make: whether admission of CG's out-of-court statements to Koster violated defendant's right of confrontation.

Defendant claims that the trial court erred in scoring ten points for OV 3, MCL 777.33(1) (physical injury to a victim). Ten points are to be scored for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim," MCL 777.33(1)(d). "'[R]equiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). For purposes of OV 3, "bodily injury" means physical damage to an individual's body. *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004). Here, the victim had tears in her vaginal area, as well as scratches and abrasions. These injuries are sufficient to constitute bodily injury and are of the type that would generally necessitate medical treatment. The trial court did not abuse its discretion in scoring ten points for OV 3.

Defendant claims that the trial court erred in scoring 15 points for OV 10, MCL 777.40 (exploitation of a vulnerable victim), because there was no evidence of a plan to rape CG. Fifteen points are to be scored for OV 10 if "[p]redatory conduct was involved." MCL 777.40(1)(a). The phrase "predatory conduct" means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), our Supreme Court clarified that "predatory conduct"

> does not encompass *any* "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." [Emphasis in original.]

The evidence showed that defendant and David acted in accordance with a plan: David beat Perdue while defendant forced CG to watch and then David forced Perdue to lay face down on the living room floor while defendant engaged in criminal sexual conduct with CG. However, there is no record evidence that defendant and David engaged in "genuinely predatory conduct." *Id.* at 462 n 7. The planning does not appear to be anything other than "run-of-the-mill" planning. *Id.* at 462. Accordingly, trial court abused its discretion in scoring 15 points for OV 10. *McLaughlin*, 258 Mich App at 671.

Defendant asserts that the trial court erred in scoring 25 points for OV 11, MCL 777.41 (criminal sexual penetration), because he was acquitted of the second count of CSC I. To score OV 11, a trial court is to "[s]core all sexual penetrations arising out of the sentencing offense," MCL 777.41(2)(a), but it is not to score the penetration that forms the basis of the sentencing offense. MCL 777.41(2)(c). Twenty-five points may be scored if one criminal sexual penetration occurred, MCL 777.41(1)(b). CG testified that, before defendant penetrated her vagina with his penis, he performed oral sex on her. He placed his mouth on her vagina. Although the jury acquitted defendant of the second count of CSC I, the trial court was not precluded from using the act of cunnilingus as a basis to score OV 11. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (stating that a trial court scores the sentencing variables using a preponderance of the evidence standard, not a reasonable doubt standard). Based on CG's testimony, there is record evidence from which the trial court could have found by a preponderance of the evidence that there was one sexual penetration arising from the sentencing offense. We affirm the 25-point score for OV 11. *Elliott*, 215 Mich App at 260.

Defendant claims that the trial court erred in scoring ten points for OV 14, MCL 777.44 (the offender's role) because he and David were coleaders. In scoring OV 14, a trial court is to consider the entire criminal transaction. MCL 777.44(2)(a). Ten points are to be scored if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). A "leader" is "one who is a 'guiding or directing head' of a group." *People v Jones*, ___ Mich App ___; ___ NW2d ___ (2013), quoting *Random House Webster's College Dictionary* (1997). As already stated, there is evidence that defendant and David acted in accordance to a plan. However, there is no record evidence that defendant came up with the plan and then guided or directed David's actions. Specifically, although CG and Perdue testified that, during the course of the criminal transaction, defendant and David talked to each other in Spanish, it is unknown what was said between them. Because there is no evidence that defendant was the leader of the plan, the trial court abused its discretion in scoring ten points for OV 14. *McLaughlin*, 258 Mich App at 671.

Defendant asserts that the trial court erred in scoring ten points for OV 19, MCL 777.49 (threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services). Ten points are to be scored for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(d). "[T]he phrase 'interfered with or attempted to interfere with the administration of justice' encompasses more than just the actual judicial process." *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). It encompasses acts that interfere with a police officer's attempt to investigate a crime. *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007). Defendant does not dispute that he was apprehended in Texas. He makes no argument that the evidence does not support the trial court's conclusion that he fled to elude the police. Because defendant's acting of fleeing interfered with the investigation of the crimes reported by CG and Perdue, the trial court's scoring of OV 19 is supported by the evidence, and we affirm the ten-point score. *Elliott*, 215 Mich App at 260.

Although the trial court erred in scoring OVs 10 and 14, reducing the scoring for these variables does not result in a different sentence range. A defendant is entitled to resentencing on the basis of a guidelines scoring error only if the error altered the recommended minimum sentence range. *People v Francisco*, 474 Mich 82, 89 n 9; 711 NW2d 44 (2006); *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). Defendant's OV score, minus the points improperly scored for OVs 10 and 14, remains at OV level 6. See MCL 777.62. Because defendant's minimum sentence range would not change if the errors were corrected, defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra